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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Amendment of Parts 2 and 90 of the)	PR Docket No. 89-553
Commission's Rules to Provide for the)	
Use of 200 Channels Outside the)	
Designate Filing Areas in the)	
896-901 MHz and the 935-940 MHz Bands)	
Allotted to the Specialized Mobile Radio Pool)	
)	
Implementation of Section 309(j))	
of the Communications Act -)	PP Docket No. 93-253
Competitive Bidding)	
)	
Implementation of Sections 3(n) and 332)	GN Docket No. 93-252
of the Communications Act)	

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**COMMENTS OF
GEOTEK COMMUNICATIONS, INC.**

Geotek Communications, Inc. ("Geotek") hereby submits its
comments in response to the Commission's Request for Comments in 900 MHz
SMR Proceeding, Public Notice, DA 95-1479, June 30, 1995 ("Public Notice").¹

STATEMENT OF INTEREST

Geotek, through its various subsidiaries holds licenses in the 900
MHz SMR band. As an incumbent 900 MHz licensee, Geotek has a strong

¹ See Second Report and Order and Second Further Notice of Proposed
Rule Making, PR Docket No. 89-533, 60 Fed. Reg. 21987 (May 4, 1995) ("900
MHz NPRM").

interest in participating in the 900 MHz SMR auctions and therefore has a direct interest in this proceeding. On May 24, 1995 Geotek filed comments responding to the Commission's 900 MHz NPRM. Geotek's comments in response to the Public Notice is set forth below.

COMMENTS

I. No "Compelling Governmental Interest" Exists for Expanding Bidding Credit Eligibility Beyond the Small Business Definition Proposed in the 900 MHz NPRM

Geotek supports the Commission's proposal to not include special credits for minority and women-owned businesses in the 900 MHz auction. The Commission's proposal as it stands is race neutral and will encompass most of the minority and women-owned businesses with an interest in this band.

No compelling governmental interest exists to satisfy the strict scrutiny standard imposed by *Adarand Constructors, Inc. v. Peña*.² As Justice Scallia observed, "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination...."³ This is true in particular in this case involving the 900 MHz licensing process. Barriers to entry in the 900 MHz band have historically been low

² *Adarand Constructors, Inc. v. Peña*, No. 93-1841 (U.S. June 12, 1995) ("*Adarand*").

³ *Adarand*, slip. op. at 1 (Justice Scallia, concurring).

resulting in a wide diversity of persons currently holding licenses -- including many women and minorities.⁴ There simply exists no history of discrimination in the allocation of 900 MHz licenses that compels race or gender-based remedial action.

Moreover, as the Court observed,

'[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate,' and that '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'⁵

The governmental interest articulated in Section 309(j)(3) of the Communications Act in "disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and woman" does not justify a separate classification in the 900 MHz auction for minority and women-owned businesses.⁶ Especially given that the Commission can adequately satisfy the governmental interest through "race-neutral means."⁷

⁴ See *900 MHz NPRM* at ¶ 135 and n.192.

⁵ *Adarand*, slip. op. at 34-35, citing *Fulilove v. Klutznick*, 448 U.S. 448, 533-35, 537 (1980).

⁶ 47 U.S.C. § 309(j)(3).

⁷ See *900 MHz NPRM* at ¶ 135.

The Commission's proposed definition of small business is race-neutral and achieves the goals of Section 309(j). The 5 MHz of available spectrum in the 900 MHz band will necessarily limit the value of the MTA licenses subject to auction and thereby permit businesses owned by minorities and women that do not meet the small business definition to actively compete on equal terms in the proposed auctions. Further, the capital needed to construct an SMR system is low as compared to other services providing further support for the Commission's initial proposal not to expand the bidding credits beyond the small business definition. As the Commission noted in the *900 MHz NPRM*, the low eligibility threshold proposed for the 900 MHz auction is justified due to the uniqueness of the 900 MHz service and the fact that a higher threshold is not necessary to "create . . . opportunities for minorities and women."⁸

Further, as the Commission observed, based on U.S. Census Data, "approximately 99% of all women-owned businesses and 99% of all minority-owned businesses generated net receipts of \$1 million or less" -- well within the Commission's proposed \$3 million threshold.⁹ Thus, Geotek agrees with the Commission's initial proposal in the *900 MHz NPRM* to limit designated entities

⁸ *900 MHz NPRM* at ¶¶ 130, 135-37.

⁹ *Id.* at ¶ 135 and n.192.

to small businesses with less than \$3 million in average gross revenues for the preceding three years.

II. No Bidding Credits Should be Awarded for MTA Licenses on Frequencies Where There are Incumbent Licensees

Geotek supports the Commission's proposal to limit eligibility for bidding credits to those entities with less than \$3 million in average gross revenues for the preceding three years. It opposes, however, the Commission's proposal to provide bidding credits on all frequency blocks -- including encumbered frequencies. Incumbent licensees who have spent substantial time and resources developing the 900 MHz band should not be required to compete with a potential new entrant with bidding credits for the MTA license on the frequencies that it currently uses.

Since 1986 when the Commission allocated 200 channel pairs for licensing in the Designated Filings Areas ("DFAs") and promised to commence "Phase II" to license areas outside the DFAs, 900 MHz licensees have been hamstrung in their efforts to build out their systems. Further, throughout this history the Commission has consistently led incumbent licensees to believe that they would be allowed to expand their systems once it adopted rules for Phase II licensing. As late as 1993, the Commission recognized that the public interest

might best be served by allowing incumbent licensees to expand their systems.¹⁰ Incumbent licensees have not only developed the spectrum but have organized their operations, established business relationships and made critical choices in reliance on the Commission's past view that expansion would be permitted when rules were adopted in Phase II of the licensing process.

Now the Commission has fundamentally changed course and proposes not only to auction frequencies currently used by incumbents but to give potential new entrants a competitive advantage through bidding credits to compete for these very frequencies. Geotek has consistently maintained throughout this proceeding that after spending substantial sums of money and investing valuable resources in the development of the 900 MHz band, incumbent licensees should not be put at a competitive disadvantage in the auction process by giving bidding credits to a new entrant to bid on the incumbent's frequencies.

Although Geotek had opposed any auctioning of encumbered frequencies, it now recognizes that auctions are necessary in order to expedite the licensing process in this band. Geotek is ready to participate in the auction process. However, application of bidding credits to encumbered spectrum will unnecessarily distort the auction process, invite speculation and harm existing

¹⁰ See generally *First Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd. 1469 (1993).

licensees contrary to the overriding public interest of ensuring rapid and efficient service to the public.¹¹ Moreover, it is patently unfair at this late date to give potential new entrants who have not invested the same time, money and resources as incumbents in developing the frequency band such an advantage.

Although the Commission has "grandfathered" incumbent systems, the protection is not meaningful absent an opportunity for the incumbent to compete fairly for the MTA license. The MTA license is the only viable option an incumbent has to expand its system to adequately serve its customers. Without the ability to expand, incumbent's systems will effectively be frozen -- an island, cut off and surrounded by the MTA licensee operating on the same frequencies.¹² The Commission should recognize incumbent's investment and the unjustified harm application of bidding credits will cause and limit their use to unincumbered spectrum.

CONCLUSION

For the foregoing reasons, Geotek supports the Commission's proposal not to include special credits for minority and women-owned businesses

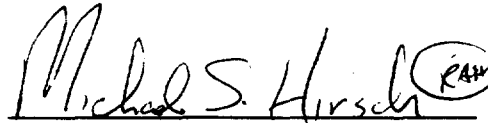
¹¹ 47 U.S.C. § 152.

¹² See Third Report and Order, GN Docket No. 93-252, Released Sept. 23, 1994 at ¶¶118-119. See also 900 MHz NPRM ¶ 44-47.

in the 900 MHz auction and requests that the small business credits be limited to unencumbered spectrum.

Respectfully submitted by:

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